BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM R. ROGERS, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,715
BIG LAKES DEVELOPMENT CENTER, INC.	)	
Respondent	)	
AND	)	
	)	
CGU HAWKEYE SECURITY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on November 8, 1999. The Order denied claimant's application for temporary total disability compensation and medical treatment.

ISSUES

The ALJ denied claimant's application on grounds that the injury did not arise out of claimant's employment. The ALJ found claimant was injured by horseplay.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and considering the arguments, the Appeals Board concludes the Order should be affirmed.

FINDINGS OF FACT

1. Claimant worked for respondent as an employment training specialist. On August 23, 1999, while filling out a request for copies of a client's work schedule, someone struck the back of his left knee. Claimant fell backwards onto the floor and injured his back. Two coworkers were in the vicinity at the time. The incident report reflects that a coworker reported she hit claimant in the back of the knee as a prank. Respondent has denied the claim, citing rules relating to horseplay. There is no indication in the evidence that the incident resulted from any animosity toward claimant or that claimant had, himself, participated in horseplay leading to the incident.

2. Respondent was not aware of any history of horseplay behavior by the coworkers.

CONCLUSIONS OF LAW

1. The Board finds that injury caused by horseplay does not arise out of employment and is not compensable unless it is shown that the horseplay has become a regular incident of the employment. The ALJ has made thorough analysis of relevant case law. The Board generally agrees with that analysis. The Kansas Supreme Court has held that a participant in horseplay may recover compensation for his/her injury where the horseplay has become a regular incident of the employment. *Thomas v. Manufacturing Co.,* 104 Kan. 432, 179 Pac. 372 (1919); *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966). Kansas decisions do not include any cases where the injury to a non-participating employee was found compensable solely on the ground that he/she did not participate in the horseplay. Several of the older decisions expressly state injury from horseplay, even injury to a non-participating employee, will not be compensable unless the employer is aware of a habit of such activity. *Stuart v. Kansas City*, 102 Kan. 307, 171 Pac. 913 (1918); *Neal v. Boeing Airplane Co.*, 161 Kan. 322, 167 P.2d 643 (1946). That rule has been restated with approval as recently as 1995 in *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995). Although that decision involved an assault in anger, the Court restated the general rule that:

> If an employee is assaulted by a fellow worker, *whether in anger or in play*, an injury so sustained does not arise "out of employment" . . . unless the employer had reason to anticipate that injury would result if the two employees continued to work together. (*Emphasis added.*)

The Kansas Supreme Court has added an exception for an assault arising from a dispute over the conditions or incidents of employment. *Brannum v. Spring Lakes Country Club, Inc.*, 203 Kan. 658, 455 P.2d 546 (1969).

Claimant argues that the current case is distinguishable from the earlier Supreme Court decisions. Claimant attempts to find a connection to work in the fact that claimant was completing paperwork and not paying attention to the coworker. But in the *Stuart* case, the claimant was attending to his duties when a coworker tossed mortar that injured claimant's eye. The connection to work was there no less than here but the Court only looked to determine whether the employer was aware of the horseplay before this incident.

2. The Board is bound to follow the Kansas appellate court precedent, absent some indication the appellate court is departing from that precedent. *State v. Jones*, 24 Kan. App. 2d 669, 951 P.2d 1302 (1998). The Kansas Supreme Court may, of course, change the rule. The Kansas Supreme Court appears to have originally followed the majority rule and the majority rule has changed. The *Stuart* decision quotes the rule found on Page 79 of Corpus Juris as follows:

> An employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by

> the employee, or whether the employee takes no part in it. If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise "out of the employment," and the employee is not entitled to compensation therefor, unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employees.

The majority rule as now stated in C.J.S., the successor to Corpus Juris, has changed since the *Stuart* decision in 1918. C.J.S. states in Section 225:

> An injury to an employee as a result of horseplay, skylarking, or practical joking is ordinarily compensable where the injured employee did not participate in the fun or where such activities were customary in the particular employment.

The majority rule is similarly described in Chapter 23 of *Larson's Workers' Compensation Law*: "Injury to a non-participating victim of horseplay is compensable." The author of the treatise recognizes such claims were once uniformly denied but cites cases from numerous states to support the assertion that such claims are now uniformly granted. The author suggests that the earlier cases "can only be understood by reconstructing the narrow conception of industrial injury which colored all early interpretations of the Act."

The Board finds no decision where a Kansas appellate court has denied benefits to the non-participating victim of horseplay as distinguished from assault in anger.[1] Finally, there is good reason to adopt a different rule. Horseplay is a common, often accepted, part of employment. Injury from the horseplay can for that reason logically be considered to arise out of the employment. There may be policy reasons to deny benefits to the instigator of the horseplay, but there is no reason to deny benefits to a non-participating victim of horseplay. Assault in anger can be distinguished. It is not an accepted part of employment.

Nevertheless, while one can say the Kansas Supreme Court may, or even predict that it will, change its previous pronouncements on this issue, one cannot say the Kansas Supreme Court has, itself, signaled its intention to change the rule.

For these reasons, the Board affirms the Order denying benefits in this case.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on November 8, 1999, should be, and is hereby, affirmed.

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[1] The *Neal* decision indicates recovery has been denied even where the injured person did not participate, but the Court cites no such case and we find none.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

c: Dan M. McCulley, Junction City, KS
Michael H. Stang, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director